IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In Re	:	
	:	Chapter 11
DECORA INDUSTRIES, INC.,	:	Bank. No. 00-4459 JJF
	:	
Debtors.	:	

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Special Master.

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MEMORANDUM OPINION

May 20, 2002
Wilmington, Delaware.

FARNAN, District Judge.

Presently before the Court is Debtor's Motion for Order Pursuant to Section 105(a), 363, 365, and 1146 of the Bankruptcy Code: (A) Authorizing the Sale of Substantially All of the Debtors' Assets to Pliant Investment, Inc., Free and Clear of Liens, Claims, Interests and Encumbrances Subject to Higher and Better Offers; (B) Approving the Asset Purchase Agreement; (C) Approving the Assumption and Assignment of Substantially All of the Debtors' Executory Contracts and Unexpired Leases; and (D) Granting Related Relief (D.I. 410), Motion for Order Approving Amendment to Asset Purchase Agreement By and Between Pliant Corporation on the One Hand and Decora Industries, Inc. on the Other (D.I. 443) and Motion for Order, Under 11 U.S.C. §§ 105 and 364, Approving and Extending Purchase Order Program With Plaint Corporation Nunc Pro Tunc to January 1, 2002 (D.I. 444) (collectively the "Sale Motion").

After reviewing the written submissions and considering the various positions presented at the May 14, 2002 hearing, the Court has concluded that the Sale Motion should be granted.

BACKGROUND

On December 5, 2000 ("Petition Date"), Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Following the Petition Date, Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

Debtors are a worldwide manufacturer and marketer of self-adhesive, branded, consumer decorative products. DII, a holding company, is a Delaware corporation, organized in 1992. As of the Petition Date, DII operated through its wholly owned subsidiaries, Decora, a Delaware corporation, and Decora Industries Deutschland GmbH.

In February 2001, the Debtors hired Houlihan Lokey Howard & Zukin ("Houlihan") to actively market Debtors' assets for sale. Together with Houlihan, Debtors compiled a list of more than 150 entities that might have the interest and financial resources to make a significant investment in Debtors or purchase all or substantially all of their assets. Through a process of "teasers," management presentations, followed by confidentiality agreements, and due diligence, Debtors assets were marketed to the potential investors. A total of 43 entities signed confidentiality agreements and engaged in due diligence activities. Debtors provided management presentations to eighteen prospective purchasers. Nine entities expressed serious interest in purchasing Debtors.

Debtors concluded that VY Capital, LLC ("VY Capital") was the highest and best bidder. On October 15, 2001, Debtors signed a letter of intent submitted by VY Capital. Ultimately, Debtors did not seek the Court's approval of the VY Motion for its acquisition of Debtor.

Thereafter, Debtors received the current offer to purchase Debtors' assets from Pliant Corporation and its wholly owned subsidiary Plaint Investment, Inc. (collectively "Pliant"), and determined that it was a better offer than the one proposed by VY Capital.

On December 13, 2001, Debtors filed the Bidding Procedures Motion seeking entry of an order approving: (i) bidding procedures designed to foster a robust Auction to ensure the highest or otherwise best offer; and (ii) certain bidding incentives and protections for Plaint, including a break-up fee and expense reimbursement. On December 31, 2001 Debtors and Pliant executed an Asset Purchase Agreement ("APA") for the purchase of substantially all of Debtors assets.

On January 3, 2001, the Court entered the Bidding Procedures Motion and agreed to hold a hearing on the Proposed Transaction no later than February 22, 2002. On January 10, 2002, Houlihan sent an announcement to more than 150 entities that it had previously contacted, including VY Capital, informing the entities of the status of the case.

On February 22, 2002, Debtors filed the Sale Motion. On March 29, 2002, the APA was amended. Subsequently, on April 1, 2002, an Amended Motion was filed. Together these motions seek to sell substantially all of the Debtors' assets to Plaint under the terms of the Amended Asset Purchase Agreement.

On April 10, 2002, the Official Committee of Unsecured Creditors (hereinafter "Committee") filed its Objection to the Sale Motion and Supplemental Sale Motion. On April 25, 2002, the Committee reached agreements with Pliant and Debtors resolving the Committee's objections to the Sale Motion and Supplemental Sale Motion.

On April 26, 2002, Debtors and Pliant further modified the Amended APA by filing the Second Amendment to Asset Purchase Agreement. This Amendment incorporated the terms and conditions negotiated in exchange for the Committee's withdrawal of its objections.

The Court held a hearing on the Sale Motion on May 14, 2002, and heard counsel for any interested parties. Objections were received from Mr. Nathan Hevrony and Hedman & Costigan, P.C. At the Hearing, the Objection of the United States Trustee was substantially withdrawn.

JURISDICTION

The Court has jurisdiction over the Sale Motion pursuant to 28 U.S.C. §§ 157 and 1334, and this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (N). Venue of the Cases and the Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

DISCUSSION

Section 363(b)(1) of the Bankruptcy Code permits a debtor to sell property of the estate outside the ordinary course of business

"after notice and a hearing." 11 U.S.C. § 363(b)(1). Generally, a debtor may sell assets outside the ordinary course of business when it has demonstrated that the sale of such assets represents the sound exercise of business judgment. In determining whether a sale satisfies this standard, the courts in this Circuit require that a sale satisfy four requirements (1) a sound business purpose exists for the sale; (2) the sale price is fair; (3) the debtor has provided adequate and reasonable notice; and (4) the purchaser has acted in good faith. In re Delaware & Hudson Railway Co., 124 B.R. 169, 176 (D. Del. 1991).

Debtors submit that the proposed sale of the Assets, subject to a higher and better offer, satisfies all four (4) of the above-described requirements. The Court will examine each in turn.

Sound Business Purpose

Currently, the Debtors' only source of outside financing is the DIP facility, which, by its terms, terminates no later than June 5, 2002. The Debtors' have no source of financing after that date. Further, Debtors' net revenues are insufficient to support the ongoing operations and the necessary capital and other improvements. To date, Debtors' have drawn more than fourteen million dollars in DIP financing, an amount which is secured by a lien on substantially all of the Debtors' assets. Therefore, Debtors' assert, and the Court agrees, that the probability of securing a new lender or equity financing is unlikely. Therefore, Debtors' have two alternatives: (1) proceed with the Proposed

Transaction, or (2) terminate business operations, employees and commence a liquidation of assets. Debtors submit that the better alternative is to proceed with the Proposed Transaction.

Mr. Hevrony objects contending that the Proposed Transaction is not the only viable alternative available to Debtors that would avoid liquidation. Mr. Hevrony contends that there are two other potential buyers, Mr. Hevrony himself and VDN AG a listed German Company ("VDN"). In support of his position, Mr. Hevrony submitted a letter of interest from VDN and a letter of proposed financing for Mr. Hevrony to purchase all or substantially all of Debtors' assets.

All parties agree that an asset sale, as opposed to liquidation, will provide more money to the estate to satisfy the creditors' claims, as well as maintaining the going concern value of Debtors. Thus, the Court will focus its attention on the three potential purchasers. In the Court's view, the Proposed Transaction with Pliant is the best alternative because due diligence has been completed, an agreement was reached, and now the details have been finalized and memorialized. Most importantly, the Proposed Transaction will close shortly after the Court's approval, pursuant to the Amended Asset Purchase Agreement, no later than May 23, 2002. Further, the Proposed Transaction, as with any sale, preserves the going-concern value of Debtors' business and the jobs of Debtors' employees. VDN and Mr. Hevrony, are at least several weeks away from offering a bid for Debtors'

assets, as financing has not been secured and due diligence has not been conducted. Debtors have been marketing their assets for over a year, and to now reject the one entity who has the support of the United States Trustee and the Official Committee of Unsecured Credits, for two illusory, potential buyers would not be prudent. For these reasons, the Court finds that the Proposed Transaction has a sound business purpose.

Sale Price

After a substantial combined marketing effort of Houlihan and Debtors to sell Debtors assets, Pliant emerged, and the Court finds that Pliant is the highest and best bidder for its assets.

The Court has received no objections on this issue.

In view of the above, the Court finds that the sale price for the Proposed Transaction is fair.

Adequate and Reasonable Notice

Courts have held that adequate and reasonable notice of a proposed sale of all of the assets of an estate should: (1)place all parties on notice that the Debtor is liquidating his business; (2) disclose accurately the full terms of the sale; (3) explain the effect of the sale as terminating the debtor's ability to continue in business; and (4) explain why the proposed price is reasonable and why the sale is in the best interest of the estate. In re Delaware & Hudson Railway Co., 124 B.R. at 180.

In early January, Houlihan sent an announcement to more than one hundred fifty potential buyers, informing these entities about

the Bidding Procedure Order and the Proposed Transaction. This announcement provided instructions on how to obtain a copy of the Purchase Agreement and encouraged participation in the Auction. On January 31, 2002 Debtors provided notice of this Motion and the hearing on this Motion to all creditors, parties that have an interest in the Acquired Assets, and parties requesting special notice in these cases. On February 21, 2002, Debtors provided the same parties with amended notice of this Motion and the hearing on the Motion. On February 22, 2002, Debtors provided notice of this Motion and the cure amounts Debtors believed would be owed in connection with the assumption and assignment of the Executory Contracts to all parties to the executory contracts. In early May, similar notice was provided for the May 14, 2002 Hearing. Debtors submit that, in light of the procedures outlined, adequate and reasonable notice was provided.

Mr. Hevrony objects contending that Debtors have not made adequate disclosure of the terms of the Proposed Transaction. Specifically, Mr. Hevrony objects that Debtors did not disclose more than $500,000 of potential claims against Pliant for delivering defective or substandard product. Mr. Hevrony further objects that Debtors have not disclosed a "side deal" between Pliant and Debtors allowing for the DIP financing to be reduced by $228,000, an amount currently held in a sequestered account resulting from Plaint's post-petition trade payable credit program.

In reply, Debtors' contend that they had an actual dollar claim for $133,000, not the approximately $500,000 claim cited by Mr. Hevrony, against Pliant for the delivery of substandard product. Debtors also contend that the Second Amendment to the Purchase Agreement supersedes the "side deal."

Relying on the unrebutted testimony of Mr. Artzer, the CEO of Debtors, the Court finds that Debtors had an actual dollar claim of $133,000 against Pliant for delivery of substandard product. The Court accepts Mr. Artzer's explanation that the $500,000 figure asserted by Mr. Hevrony was a product of aggressive accounting, to be used as a negotiation tool against Plaint. Further, the Court finds that the $133,000 claim occurred in the ordinary course of business and therefore did not require disclosure. The Court also finds that Debtors' ability to successfully assert the claim against Pliant, at a time when Debtors were experiencing a liquidity crunch, ultimately benefitted the estate. Debtors were able to use the claim to withhold and offset payments to Pliant on accounts due and thereby assist the cash management.

The Court also finds, based on Mr. Artzer's testimony, that the "side deal" is superseded by the Second Amended Asset Purchase Agreement. The Court finds that the entire Proposed Transaction is memorialized in the Second Amended Asset Purchase Agreement, which as discussed, the Court finds to be fair and reasonable.

Mr. Hevrony further objects, contending that Debtors have not given reasonable notice of the sale to interested parties or

potential bidders. Specifically, Mr. Hevrony objects that Rule 2002(a)(2) of the Federal Rules of Bankruptcy requiring twenty days notice by mail to all creditors when a sale of the debtors' property outside the ordinary course of business was violated. Further, Mr. Hevrony objects contending that the interested parties did not receive the required notice concerning the May 14, 2002 sale and Debtors failed to publish notice of the Proposed Transaction.

The Court understands the crux of Mr. Hevrony's objection to be the failure of Houlihan or Debtors to notify VDN of the Bidding Procedure Order and the Proposed Transaction. VDN is a potentially strategic buyer, who has recently expressed some interest in investigating a possible purchase of Debtors. However, the Court finds that the notice provided, to the public and potential bidders, was not inadequate or unreasonable. With regard to VDN, the Court finds that Mr. Artzer had contact with its parent company, LPW in the summer of 2001 and neither VDN nor LPW expressed serious interest in purchasing Debtors at that time. Therefore, although VDN did not receive actual notice of the Bidding Procedure Order of the Proposed Transaction, the Court finds that the notice provided to the public was not inadequate or unreasonable.

In view of the Court's scheduling of the May 14 Hearing, the Court does not find that Debtors violated Rule 2002. While newspaper publication is certainly evidence of adequate notice, the

Court finds it unnecessary in the instant case, where the marketing of the Debtors' assets was strategic and specifically targeted at one hundred fifty (150) potential buyers. Therefore, considering the totality of the circumstances, the Court finds that the marketing of Debtors' assets and the corresponding notice provided to the public and specific potential buyers, was sufficiently adequate and reasonable to ensure that all interested parties had an opportunity to bid for the assets

Good Faith of Purchaser

The Bankruptcy Code does not define "good faith;" however, the Court of Appeals for the Third Circuit has held that:

> [t]he requirement that a purchaser act in good faith ...speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchase and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.

In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 147 (3rd Cir. 1986).

Debtors submit that the Proposed Transaction, as reflected in the Purchase Agreement, is an intensely negotiated, arms-length transaction, in which Pliant has consistently acted in good faith.

Mr. Hevrony strenuously objects, contending that the actions of Pliant and Decora demonstrate a lack of good faith. Mr. Hevrony asserts that the lack of good faith is demonstrated by a course of conduct between Pliant and Debtors that has persisted for months during which Pliant and Debtors, among other things, engaged in the

illegal credit program, shifted virtually all of their suppliers to Pliant, accepted egregious terms concerning such illegal "credit" and failed to properly disclose those term to the Court or any interested party. Mr. Hevrony further cites to the objections of the United States Trustee and the Committee on the lack of good faith, which have been withdrawn.

Many of Mr. Hevrony's objections to a finding of good faith were considered and rejected in the context of the Amended Application For Appointment of Trustee. The Court has considered Mr. Hevrony's objections anew in the context of the Proposed Transaction. The Court finds that as a matter of survival, Debtors' formed a close, but not improper relationship, with Pliant in order to remain a going concern. The Court finds that although some aspects of the relationship as it developed are troubling, the Court cannot say that they establish a lack of good faith between Debtors and Pliant with regard to the instant sale of assets.

Following the May 14 Hearing, Debtors suffered an annual revenue loss of $4 million when Target Corporation ("Target") transferred its 2003 business relationship to a competitor of Debtors. In the Court's view, Target's decision demonstrates the precarious financial and business situation of Debtors and demonstrates Debtors need for a final decision. Pliant is willing to go forward with the transaction and the Court finds that to maintain Debtors as a going concern, this Proposed Transaction cannot be delayed. Moreover, prior to the May 14 Hearing, both the

Committee and the United States Trustee withdrew their objections, supporting the Proposed Transaction and a finding of good faith.[1] Therefore, because both the Committee and the United States Trustee, who acts as an independent party, approve and support the Proposed Transaction, the Court finds that Pliant is a good faith purchaser.

Section 363(f) Sale Free and Clear

Section 363(f) fo the Bankruptcy Code provides:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) such entity consents;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> (4) such interest is in a bona fide dispute; or
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

Because §363(f) is drafted in the disjunctive, the satisfaction of any of the requirements outlined is sufficient to warrant Debtors' sale of the Acquired Assets free and clear of all

[1]By letter dated May 17, 2002, the United States Trustee informed that Court that she "strongly supports the Court deferring its decision" to allow VDN time to conduct due diligence and potentially make a higher and better offer. In light of the recent developments, and because VDN has only expressed an interest in Debtors, the Court concludes that the Proposed Transaction must go forward. Debtors have been marketing their assets for fourteen months, and the Sale Motion has been pending for almost three months, closure is required.

Interests as provided in the Purchase Agreement, except with respect to such Interests as are assumed liabilities pursuant to the Purchase Agreement.

Debtors submit that with respect to each Interest that is not an assumed liability, at least one of the five conditions of § 363(f) is satisfied. Specifically, Debtors submit that each holder of an Interest will consent to the Proposed Transaction or will be adequately protected by having its Interest attach to the net proceeds of the Proposed Transaction. Further Debtors submit that the Purchase Price will be sufficient to satisfy all secured claims, and that the DIP facility has consented, or will consent to the Proposed Transaction.

At the May 14 Hearing the Court received the objection of Hedman & Costigan, P.C. (hereinafter "Hedman"). Hedman objects to the sale because it represents that it has a lien on certain patents of Debtors which are included in the sale. In reply, Debtors asserted that, to the extent the lien is valid, it would attach to the proceeds of the seal. At the Hearing, the Court overruled the objection finding the lien is protected by the Bankruptcy Code.

Because the Court has overruled all objections on this issue, and accepting Debtors' assertions as true, the Court finds that the Asset Sale satisfies the requirements of § 363(f) for a sale free and clear.

Relief From Transfer Taxes Under Section 1146(c)

Section 1146(c) of the Bankruptcy Code provides that "the making or delivery of an instrument of transfer under a Plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C. § 1146(c). This language has been construed to include transfers pursuant to a sale outside of, but in furtherance of, effectuating a reorganization plan. In re Hechinger Ivestment Co., 254 B.R. 306 (Bankr. D. Del. 2000).

Debtors submit that consummation of the Proposed Transaction is a necessary step toward plan confirmation and the resolution of the Chapter 11 bankruptcy cases, and therefore request exemption from stamp tax or similar taxes under § 1146(c) of the Bankruptcy Code.

The Court agrees that confirmation of the Proposed Transaction is critical to confirmation and the successful resolution of the bankruptcy. Therefore, the Court concludes that the Proposed Transaction shall be exempt from taxes under § 1146(c).

Authorization of Assumption of Assumed Contracts

Debtors request approval under section 365 of the Bankruptcy Code to assume and assign the Assumed Contracts to Pliant or the Successful Bidder as contemplated in the Purchase Agreement.

Section 365 permits a debtor to assume and assign its executory contracts and unexpired leases if (a) the debtor assumes such contract or lease in accordance with the provisions of this

section; and (b) adequate assurance of further performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.
11 U.S.C. § 365 (f)(2).

Under § 365 a debtor may assume an executory contract or unexpired lease "subject to the court's approval" if (a) it cures, or provides adequate assurance that it promptly will cure, any default under such contract or lease; (b) compensates, or provides adequate assurance that it will promptly compensate, any non-debtor party to such contract or lease "for any actual pecuniary loss to such party resulting from such default;" and (c) provides adequate assurance of its future performance under such contract or lease.
11 U.S.C. § 365 (a)(b)(1).

Courts have applied a "business judgment" test in determining whether to approve a debtor's decision to assume an executory contract. Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific, Railroad, Co., 318 U.S. 523, 550 (1953). A debtor satisfies the "business judgment" test when it determines, in good faith, that assumption of an executory contract will benefit the estate and unsecured creditors. In re FCX, Inc., 60 B.R. 405, 411 (Bankr. E.D.N.Y. 1986). Further, what constitutes adequate assurance depends on the particular facts and circumstances of each case, but adequate assurance falls short of an absolute guaranty of payment. Cinicola v. Scharfenberger, 248

F.3d 110, 120 (3rd Cir. 2001); In re Prime Motor Inn, Inc., 166 B.R. 993, 997 (Bankr. S.D. Fla. 1994).

Debtors submit that the assumption and assignment of the Assumed Contracts will provide other real tangible benefits to Debtors and their estates including the (i) curtailment of further administrative liability and (ii) elimination of many rejection claims. Thus, Debtors submit that the assumption and assignment of the Assumed Contracts will benefit the estates and their creditors. Debtors further submit that the non-Debtor parties to the Assumed Contracts have adequate assurance of Pliant's future performance under such contracts.

Having received no objections on this issue, the Court concludes that Debtors have exercised their sound business judgment to assume and assign the Assumed Contracts, so that they will benefit the estate and its creditors. The Court further concludes that Debtors have demonstrated adequate assurance through the financial solvency of Pliant and its significant investment in Debtor.

The Proposed Transaction Does Not Constitute an Improper "Sub-Rosa" Plan

A debtor and the Bankruptcy Bourt cannot short circuit the requirements of 11 U.S.C. § 1101 et seq. for confirmation of a reorganization plan by establishing the terms of the plan sub rosa in connection with the sale of assets. In re Braniff Airways Inc., 700 F.2d 935 (5th Cir. 1983). The focus of "sub rosa" plan analysis is oriented toward those situations in which a debtor

proposes to sell "all," or "substantially all" of its assets without the benefit of a confirmed plan or a court-approved disclosure statement.

Debtors submit they do not have sufficient time to confirm a plan incorporating the Proposed Transaction. Debtors submit that adequate notice has been given to all interested parties. Debtors also submit that sound business reasons exist for the timely consummation of the Proposed Transaction. Due to Debtors precarious financial position, Debtors submit that timing is critical. Further, Debtors submit that the Purchase Agreement does not unfairly benefit any insider, creditor or class of creditors, does not attempt to govern the distributions that may be made under a plan, and the Committee and Debtors will seek confirmation of a liquidating plan to effect distributions.

The Court understands the precarious financial and business position of Debtors. The Court also recognizes the prudence and fairness of the Proposed Transaction, as previously discussed. Accordingly, because the Court will oversee the confirmation of a plan and the subsequent distribution of the assets, and after considering the totality of the circumstances, the Court concludes that the Proposed Transaction does not constitute an improper "sub rosa" plan.

Request For Relief In Connection With VY Capital's Alleged Claims

The Court has requested additional briefing on this issue. Therefore, the Court has concluded that injunctive relief is not

warranted but will consider a finding concerning the effect of the VY Capital documents vis-a-vis liability of Pliant. The Court will reserve decision at this time.

Request For Waiver of Stay Per Rules 6004(g) and 6006(d)

Bankruptcy Rule 6004(g) allows a stay on an "order authorizing use, sale or lease of property, other than case collateral, until the expiration of ten days after the entry of the order." Bankruptcy Rule 6006(d) provides that an "order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise."

Debtors request that the Court waive these Rules, to the extent applicable, because the parties may choose to close the sale in fewer than eleven days after the Sale Hearing. Debtors contend that absent an objection and request for a stay, Debtors are not aware of any party that would need the benefit of the protections offered by these Rules.

Mr. Hevrony requests that in the event the sale is approved, certain interested parties be allowed the remaining time available under the Second Amendment to conduct due diligence to determine if they are prepared to offer a higher bid.

The instant sale motion has been pending for several months. Further, the Court understands that an immediate closing is required to remedy Debtors' precarious financial and business

position. Accordingly, the Court will waive the Rules 6004(g) and 6006(d), allowing the parties to close.

CONCLUSION

An appropriate Order will be entered.